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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-99

HOWARD S. SPERING, *Petitioner*

v.

TEXAS BUTADIENE & CHEMICAL CORPORATION,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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July 19, 1971.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner, Howard S. Spering, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on October 21, 1970, with respect to which a rehearing was denied by order of that Court dated April 19, 1971.

OPINION BELOW

The opinion of the Court of Appeals as modified by order of that Court dated November 13, 1970, reported in 434 F.2d 677, appears in the Appendix hereto. A

copy of the order entered April 19, 1971 denying rehearing also appears in the Appendix hereto. No opinion was rendered by the District Court for the District of Delaware.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on October 21, 1970 and modified by that Court's order dated November 13, 1970. A timely petition for rehearing in banc was denied on April 19, 1971, and this petition for certiorari is filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether conflicting courts of appeals decisions with respect to dismissals of plaintiffs' substantial claims with prejudice and without a trial on the merits, for failure of their attorneys to prosecute within local calendar rules, without knowledge of, or prior notice directly to, their clients of the attorneys' critical defaults and a fair opportunity to correct them, require resolution and a review of a nine-year-old 4-to-3 decision of the Supreme Court persistently protested by some justices, and repeatedly rejected by some courts of appeals as harsh, vicarious punishment, unnecessary, and an unjust denial of a party's right to a fair day in Court?

2. Whether the undisputed fact of an attorney's repeatedly giving incorrect and misleading information to his client on the status of the case, stating, among ther things, that defendant was responsible for long delays, acknowledged by the attorney on the record, presents a case of breach of his agency releasing the client from the consequence of his attorney's undisclosed critical neglects under local calendar rules, and

a matter of first impression not heretofore resolved by the Supreme Court in cases denying plaintiffs a trial on the merits solely for failure of their attorneys to prosecute.

3. Whether, in such a case, dismissal with prejudice of a valid and substantial claim based on long privity of vital professional services by a plaintiff in the formation and operation of the defendant, is repugnant to the sense of justice and to a litigant's right to due process, when entered without his knowledge of his attorney's critical defaults under local calendar rules and without an opportunity afforded him after notice thereof to correct them by pursuing his case through discovery and a trial on the merits.

4. Whether an attorney's neglect and concealed failure to prosecute within local calendar rules not known to his non-resident client, should result in dismissal with prejudice of his client's substantial claim without a trial on the merits, when an attorney has no general or implied authority in law to agree to, or otherwise to effectuate formally, any such dismissal with prejudice without express approval and authority to do so from his client, which had never been obtained.

LOCAL RULES OF COURT INVOLVED

Local Rule 12 of the United States District Court for the District of Delaware:

> "Subject to the provisions of Rule 23(c), F.R. C.P., in each cause pending, wherein no action has been taken for a period of one year, the Court may, on its own motion or upon application of any party and after reasonable notice, enter an order dismissing such cause unless good reason for the inaction is given. An application for continuance shall not be deemed to be action precluding such

dismissal. After any such application for dismissal has been filed, no application for a continuance or any proceeding taken under discovery rules, F.R.C.P., shall be deemed to toll the application of this Rule."

Local Rule 3. Calls of Calendar, of the United States District Court for the District of Delaware, appears in full in footnote 2 of the Opinion of the Court of Appeals in this case, which is printed in the Appendix.

STATEMENT OF THE CASE

A dispute arose between petitioner, Spering, a Yale Law School graduate of 1932 in private law practice in Washington, D. C. and the respondent, Texas Butadiene & Chemical Corporation, TB&C, a Delaware corporation, in December 1964 over the amount of full compensation to which Spering was entitled for professional services rendered to TB&C. Spering had rendered vital professional services for TB&C in two separate periods: the first, of more than 8 years from March 1954, prior to the organization of TB&C, through July 1962, when TB&C's plant facilities were sold to Sinclair Petrochemicals, Inc., a subsidiary of Sinclair Oil Corporation; and the second, from June 1963 through October 1964, involving the Government's renegotiation of TB&C's government contract business.

1. First Period of Service

Spering's services for TB&C commenced in March 1954, prior to the incorporation of TB&C in July 1954, in the interest of creating it and its then proposed business project for the construction and operation of plant facilities for the manufacture of aviation gasoline for sale to the government and butadiene for sale to the synthetic rubber manufacturing industry. Spering had

unique knowledge and background experience with Government and the petroleum industry in both of these product industries over the preceding 12 years. TB&C was enabled to borrow the necessary first mortgage funds to initiate construction of such facilities by assignment to banks of a $15,000,000 Facilities Investment Underwriting contract negotiated for it by Spering and finally executed by the Department of Defense on July 13, 1955. The common stock of TB&C for that initial plant financing was owned 89% by Godfrey L. Cabot, Inc. (now Cabot Corporation) and Carl M. Loeb, Rhoades & Co., who continue to be the controlling stockholders.

The plant was completed in February 1957. Among many other services for TB&C, Spering was primarily responsible for successfully negotiating ten (10) successive supply contracts for TB&C with the Department of Defense, which aggregated about $112,000,000 of sales (approximately 60% of TB&C's total business) in the period from February 1957 through July 1962. In that first period of eight and one-third years, Spering devoted 851 days of recorded service time, an average of approximately 100 days per year, to TB&C's affairs. TB&C had achieved a net profit after taxes of $25,805,078 before payment in August 1962 of its initial distribution to stockholders following the sale of the plant to Sinclair. More than $18,000,000 of this was net gain from sale of assets, the rest was net income earned chiefly in the later years of operations.

The dispute concerning full compensation for services in this first period arose from Spering's clear understandings at the outset, and later repeated, with the initiator of the project and first president of TB&C. The basic arrangement was that, if Spering

would serve the TB&C project at support-level per diem rates during the preliminary development, promotion and construction years and the non-profit or low-profit operating years, he would be ultimately compensated on the basis of the real value of his services to the project to be determined in the light of the success of the undertaking when the measure of its success and his contributions to it could be determined and such compensation could be readily paid. Spering claims herein that the fair value of his services to TB&C in this first period may be fairly measured as at least 3% of the $25,000,000 net profit after taxes, or $750,000. This is less than 1% of the $112,000,000 of sales to Government he was primarily responsible for negotiating for TB&C. Having received $148,498 in per diem fees from TB&C during that long first period, he would credit this against the gross amount, and claims herein that the balance of about $601,000 remains payable to him with respect to this first period. See Spering's deposition, Docket #32, pages 178-9.

Throughout this entire period of service, the payments Spering received from TB&C were essentially minimum per diem compensation, sufficient only to provide support for him, his office, and office personnel to be able on a current basis to continue the work for TB&C. Indeed, the information contained in Spering's depositions, Docket # 32, and his answers to interrogatories, Docket # 25, with exhibits identified, in the record in this case disclose comprehensive data from his records that show that such compensation from TB&C was *substantially below* "fair value" compensation he received from some other clients, and was even below the average net compensation he received from *all* other clients.

2. Second Period of Service

Subsequently, in May 1963, the Government initiated renegotiation proceedings against TB&C under its Government contract business that was concluded in July 1962. Spering was then requested to represent TB&C in those proceedings, and did so actively from June 1963 through successful conclusion in October 1964, first before the Eastern Regional Renegotiation Board and later before the national Renegotiation Board. The national Board regarded the whole operation and sale of the plant as constituting a "windfall" to the proprietors of TB&C. Its figures reflected claims of excessive profits aggregating more than $700,000. To this would have been added a penalty of at least $350,000, since penalties are assessed at 100% of the amounts of costs deemed to have been mispresented in the original contracts negotiated on the basis of represented costs. Thus a total of more than $1,050,000 was at stake in these negotiation proceedings. See Spering's deposition, Docket # 32, pages 169-171. Spering's 63.5 days of recorded service time in this second period resulted in the final Notice of Clearance issued by the national Board on October 15, 1964, with *no payment* of any amount by TB&C to the Government.

The dispute concerning full compensation for services in this second period arose from Spering's claim for compensation on the basis of *quantum meruit.* Such real value of his services, to which attorneys are entitled within the sense of Canon 12 of the Canons of the American Bar Association, could only be determined and asserted when the work was completed and the success achieved could be known and evaluated. Spering claims that the fair value of his services to TB&C in this second period may be fairly measured as

approximately 30% of the $1,050,000 amount that was at stake in these renegotiation proceedings, or $315,000. Having received $15,655 in sustaining fees from TB&C during this second period, he would credit this against the gross amount, and claims herein that the balance of about $300,000 remains payable to him with respect to the second period of service. See Spering's deposition Docket # 32, pages 174-7.

3. History of the Case

This action was commenced in the United States District Court for the District of Delaware on June 25, 1965. Jurisdiction in that federal court was based on diversity of citizenship, Spering, the plaintiff, being a resident of Chevy Chase in the State of Maryland, and TB&C being incorporated under the laws of the State of Delaware. The matter in controversy, exclusive of interest and costs, substantially exceeds the $10,000.00 amount required for jurisdiction.

The suit was initiated within nine (9) months after Spering had last rendered services to TB&C in October 1964, and approximately seven (7) months after TB&C rejected his final statement and requested a billing on a time basis of compensation. Spering was represented by Morris, James, Hitchens & Williams, one of the larger law firms in Wilmington, Delaware, under a contingent fee agreement. The firm assigned two of its senior trial lawyers to handle the case, though only one of those two communicated with Spering throughout the proceedings in the District Court and through oral argument before the Court of Appeals. That firm and the individual lawyer were dismissed by Spering shortly after the October 21, 1970 ruling by the Court of Appeals. Said firm and that one member of the

firm will be referred to herein as Spering's attorneys or attorney, or his former attorneys or attorney.

TB&C's attorneys commenced taking Spering's deposition for a full day in Wilmington, Delaware on August 12, 1965. Spering's entire files covering his work for TB&C over the eleven (11) year period were then promptly delivered to his former attorneys' office in Wilmington on demand of TB&C's attorneys, who examined them at length between September and December 1965. TB&C's answer was then filed December 6, 1965 after many requests by its attorneys for extensions of time, and on December 14, 1965 extensive interrogatories to Spering were filed by TB&C. On December 30, 1965, TB&C resumed taking another full day of Spering's deposition in Wilmington, Delaware and, on adjourning, indicated it would continue at a later date. TB&C then amended its answer on January 17, 1966.

Spering's attorneys opposed those interrogatories as unduly burdensome and largely irrelevant because they would require him to examine comprehensively every file for every one of his clients over the eleven-year period from 1954 through 1964, and his time records, to determine precise amounts of fees received, all fee arrangements in each matter for each client, the extent of time devoted to each and to compile and report all such information together with tables of totals. Nevertheless, after consideration of briefs and oral argument, the District Court entered an order on July 29, 1966 overruling those objections. Spering was thus compelled to devote more than 20 full days of work in ferreting out all those files and information, reporting and compiling the same, and preparing the answers to those

interrogatories. His answers filed on October 21, 1966 consisted of 14 pages legal size, plus table exhibits.

A. Former Attorney's Neglect and Misleading Statements

Spering's affidavits dated September 20, 1969 and October 14, 1969 filed in the District Court on October 15, 1969, and his statements at the hearing on October 16, 1969, show his time devoted to those answers and his continued attention to his case at all times. Docket # 45 and # 49. They also show the following undenied fact and events:

(1) Spering's attorneys wrote him a letter dated January 16, 1967 falsely stating that the Interrogatories to TB&C enclosed therewith had been "filed". Docket entries in that District Court, examined by Spering after learning of dismissal of his case, show that those interrogatories were not in fact filed until 13 months later on February 1, 1968, Docket # 26. TB&C's answers to those Interrogatories were filed on May 21, 1968, but Spering never was provided a copy of them until after his case was dismissed on September 16, 1969.

(2) From March 28, 1967 until December 20, 1968 Spering's attorney repeatedly advised Spering falsely that he had called for TB&C's files to be made available for examination, and that TB&C was responsible for delaying Spering's discovery efforts to examine those records, by stating that TB&C had not yet consolidated all such files and records from Houston and New York at one location and had not yet determined which papers did not relate to Spering that they might refuse to allow to be examined. Affidavits of two attorneys for TB&C, filed after dismissal of the case, flatly denied

that any such call, request, or demand had ever been made by Spering's attorney. His attorney also admitted to the District Court at the reargument on October 16, 1969 that he had never made "any effort" to get TB&C's records for examination. Docket # 45, page 9.

(3) Promptly after Spering's attorney informed him on December 20, 1968 that TB&C's attorneys had advised that their records were now consolidated and could now be examined, Spering and his attorney made plans to meet in Wilmington on Monday, January 13, 1969 and then go to New York to examine TB&C's records. But Spering's attorney wrote Spering on January 8, 1969 that he could not meet on January 13 and would fix a new date with Spering. Again in response to Spering's letter of March 26, 1969 to his attorney demanding that TB&C's records be examined promptly, his attorney wrote on April 1, 1969 that he is "giving the matter of production of records further attention at this time on a priority basis." His later admission to the Court that he had never made any effort in this direction constituted an acknowledgement that all of these communications to Spering were false.

(4) On August 4, 1969 Spering and his attorney agreed to go to New York for examination of TB&C's records in the week of August 18, 1969. But again Spering's attorney wrote him on August 13, 1969 advising that he had not finalized the plans to inspect TB&C's documents during the week of August 18th as discussed, but was attempting to combine the inspection with taking of depositions of TB&C's executives, and will have further advice for Spering concerning this matter shortly. That letter completely concealed the fact, clear from the Docket entries in the

District Court, that a motion for dismissal of Spering's case had been filed on August 6, 1969 and that his attorney had signed an acknowledgement of receipt of service of a copy of it on August 6, 1969, seven days before his letter to Spering.

(5) Spering had no knowledge or notice whatsoever of the fact that his case had been on the call of the Calendar under Local Rule 3 in September 1968 and again in September 1969, or that TB&C's motion to dismiss for failure to prosecute had been filed, until he received his attorney's letter on September 17, 1969 advising that his case had been dismissed by the District Court.

B. District Court Found No Guidelines, and Acted to Obtain Guidance from the Third Circuit Court of Appeals that Pressed for Disposal of Cases

On September 22, 1969, Spering's attorney filed Motion for Reargument, with an abbreviated affidavit by Spering attached stating his understanding that TB&C had been delaying Spering's examination of TB&C's records for about 21 months through December 1968. On October 6, 1969, TB&C's attorneys filed two affidavits denying that any call had been made to examine TB&C's records. On October 15, 1969, Spering personally filed additional affidavits containing the information recited in the above enumerated paragraphs. At the hearing on the Motion for Reargument on October 16, 1969, the substance of these affidavits was reviewed orally by Spering before the Court, and Spering's attorney made no denial of any of these statements when the Court afforded him an opportunity to do so or to explain. His only response was that he had no explanation, and he had already admitted to the

Court that he had never made "any effort" to get the TB&C documents.

At this reargument on October 16, 1969 the Chief Judge of the District Court stated that he was "assuming for the purpose of this argument that you (Spering) have a legitimate claim (against TB&C)" Docket # 49, pages 31 32. After TB&C's attorney argued that the case of *Link* v. *Wabash R.R. Co.*, 370 U.S. 626 (1962) at 663-4, ruled that controversies between a lawyer and his client do not affect the question of dismissal, the District Court Judge referred to the case of *Glo Co.* v. *Murchison Co.*, et al., 397 F.2d 928 (CCA-3-1968) cert. den. 393 U.S. 939, in which the Court of Appeals had reversed his own dismissal of that case for failure to prosecute, on motion of the same attorneys as represent TB&C in the instant case. The following from the transcript of the hearing on reargument in this case shows the confusion that confronts District Court Judges in such cases, and that the Chief Judge's refusal to vacate the dismissal of Spering's case was motivated by a need to have the appellate courts provide some specific guidelines in such cases, Docket # 49, pages 34-5:

> "THE COURT: . . . . That case, of course, did not give us too many guidelines as to what the District Courts were supposed to do. *If I deny this and send it up, maybe the Circuit Court will give us some more specific guidelines as to how we are to dispose of these cases where the responsibility lies with the attorney for not pressing the case and not with the client.* (Italics supplied)
>
> "MR. VEASEY: I said in my petition for certiorari in the Glo Co. case that I felt that the case did not set forth the guidelines; it refers to 'unusual circumstances'.
>
> "THE COURT: And you got nowhere with it.

> "MR. VEASEY: I don't know what that means and the Supreme Court apparently did not feel that it was necessary to review that case at that time. So I don't know what the Court of Appeals decision means. I really don't."

The District Court Judge who dismissed Spering's case on September 16, 1969, when ruling on the motion to dismiss, obviously also felt under strong pressure from the appellate court. His last words at the hearing on the motion, Docket # 50, page 4, were:

> "I have had a letter only this morning from Judge Hastie asking why these delays in these old cases. So, you prepare that order and submit it, and I will sign it."

C. The Court of Appeals Provided No Guidelines

Notice of the appeal to the Court of Appeals for the Third Circuit was promptly filed on October 16, 1969 and the case was docketed in the Court of Appeals on November 25, 1969. Briefs on behalf of Spering were filed in the Court of Appeals by Spering's former attorneys, who also argued the case on appeal.

The ruling of the Court of Appeals, in its Opinion dated October 21, 1970 as modified November 13, 1970, provides that "The case insofar as it relates to any claims prior to February 25, 1964 is thus stricken from the docket" and directs the District Court "to limit its inquiry and any award which it might make to services actually performed by appellant for appellee after February 25, 1964". The Opinion provides no guidelines or clarification of the "unusual nature of the circumstances" that caused it to reverse the dismissal in the *Glo Co.* case, supra. It simply states, without explanation, that they "are not present here". The un-

usual circumstances of the former attorney's acknowledged course of misrepresentations and non-disclosures to his client, as well as misleading concealment of the status of the case, are not mentioned in the opinion, although the record before it from the District Court and in such attorney's Briefs to the Court of Appeals establish these facts indisputably.

Shortly after that decision, Spering dismissed his former attorneys and they withdrew on the record. Spering, acting as his own attorney, then filed a timely Petition for Rehearing and Suggestion of Rehearing in Banc with the Court of Appeals on January 13, 1971. On April 19, 1971, the Court of Appeals in banc entered an order denying the Petition for Rehearing, a copy of which appears in the Appendix.

REASONS FOR GRANTING THE WRIT

I

THE DECISION BELOW CONFLICTS WITH MANY DECISIONS OF FEDERAL COURTS THAT REFUSE TO APPLY THE HARSH RULE OF THE SUPREME COURT'S CONTROVERSIAL 4 TO 3 DECISION IN 1962 IN LINK v. WABASH RAILROAD COMPANY, IN CASES OF DISMISSALS OF PLAINTIFFS' SUBSTANTIAL CLAIMS WITHOUT A TRIAL ON THE MERITS BECAUSE OF THEIR ATTORNEYS' FAILURE TO PROSECUTE

The Court of Appeal's Opinion in the instant case is based entirely on the unquestioning, inflexible application of the following harsh statement it quotes from the 4-member ruling Opinion of the Supreme Court in *Link* v. *Wabash Railroad Company*, 370 U.S. 626, 633-634, 82 S. Ct. 1386, 1390, 8 L.Ed. 2d 734, 740 (1962):

> "There is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action,

> and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.' "

That statement as the rule of the *Link* case was highly controversial when written. Justices White and Frankfurter took no part in the decision, and three other Justices dissented. Mr. Justice Douglas dissented, and Chief Justice Warren concurred in a thoroughly-reasoned dissenting opinion by Mr. Justice Black, in which he concluded, at page 649:

> "To my mind, however, it is of very great importance to everyone in this country that we do not establish the practice of throwing litigants out of court *without notice to them* solely because they are credulous enough to entrust their cases to lawyers whose names are accredited as worthy and capable by their government. I fear that this case is not likely to stand out in the future as the best example of American justice." (Italics supplied)

Spering's case is one of many where, indeed, the *Link* case has established just such a practice in some federal courts of "throwing litigants out of court without notice to them", and without a trial on the merits, solely because of their attorneys' defaults.

The *Link* case in only 9 years has been cited, according to Shepard's Citations, in at least 140 cases. It has been reviewed in at least five law journals and the American Bar Association Journal, which generally support the view expressed in Mr. Justice Black's dissent that dismissals without a trial on the merits solely

because of an attorney's defaults constitute harsh and unnecessarily drastic and unjust sanctions when the client has not been given notice of his attorney's default and an opportunity to correct it. The note in *72 Yale Law Journal 826* (1963), for example, concludes at page 832:

> "The *Link* case—highlighted by the drastic nature of the sanction, and the direction of the sanction at an unknowing party who should not be deemed responsible for the misconduct of his attorney—illustrates the need for judicial thought on the subject of standards to govern the use of sanctions at the pretrial conference.
>
> "As the *Link* case demonstrates, the law on the use of sanctions at the pretrial conference phase is developing without the establishment of clearly defined standards. . . ."

Mr. Justice Black and Mr. Justice Douglas have persistently protested the 4-member ruling opinion in the *Link* case on many occasions. Mr. Justice Black has taken the unusual course of writing dissenting opinions in many cases of denials of certiorari where dismissals without a trial had been affirmed by the Court of Appeals: *Lord et al.* v. *Helmandollar et al.*, 383 U.S. 928 (1966); *Riess et ux* v. *Murchison et al.*, 383 U.S. 946 (1966); *Beaufort Concrete Co.* v. *Atlantic States Construction Co.*, 384 U.S. 1004, 86 S. Ct. 1908 (1966), in which he stated at page 1006 "Procedural paper requirements should never stand as a series of dangerous hazards to the achievement of justice through a fair trial on the merits"; *Pittsburgh Towing Co.* v. *Mississippi Valley Barge Line Co., et al.*, 385 U.S. 32 (1966), in which he concluded "The conflict between the interest of the court clerk in the timely filing of papers and the interest of the citizen in having

his lawsuit tried should be reached in favor of the citizen; not the court clerk"; *Berman* v. *U.S.*, 378 U.S. 530 (1964), joined in his dissent by Chief Justice Warren, Mr. Justice Douglas and Mr. Justice Goldberg, concluding "I am uncomfortable with the notion that courts exist to fashion and preserve rules inviolate instead of to apply those rules to do justice to litigants"; *Surowitz* v. *Hilton Hotels Corp.*, 383 U.S. 363, 373 (1966); *Santana et al.* v. *U.S.*, 385 U.S. 848 (1966); and *Morris* v. *Florida*, 393 U.S. 850, 89 S. Ct. 84 (1968), joined in a strong dissent by Mr. Justice Douglas, stating:

> "... the Court once again sanctions the practice of automatically depriving plaintiffs of their lawsuits or defendants of their defenses merely because their lawyers have failed to file some papers within the time required by Court rules. This is a form of *vicarious punishment* against which I have frequently protested in both civil and criminal cases, but in vain ... (listing cases)
>
> "... there is a vast difference between, on the one hand, holding the litigant responsible for errors in not objecting to evidence or pleadings, and, on the other hand, holding the litigant responsible for complete failure to file papers and then without notice to the litigant dismissing his entire case or defense." (Italics and parenthetical material supplied)

Mr. Justice Black dissented from amendments to the Federal Rules being promulgated in a Statement at 383 U.S. 1029 (1966), in which he suggested, at page 1036, that a specific subdivision (c) be added to Rule 41 "as a further guarantee against oppressive dismissals", that would provide:

> "No plaintiff's case shall be dismissed or defendant's right to defend be cut off because of

the neglect, misfeasance, malfeasance, or failure of their counsel to obey any order of the court, unless and until such plaintiff or defendant shall have been personally served with notice of their counsel's delinquency, and not then unless the parties themselves do or fail to do something on their own part that can legally justify dismissal of the plaintiff's case or of the defendant's defense."

A. Other Circuit Courts That Disagree in Principle with the Decision Below

(1) District of Columbia Circuit Court of Appeals

The U. S. Court of Appeals for the District of Columbia in *L. P. Steuart, Inc.* v. *Matthews,* 329 F. 2d 234 (C.A. D.C.—1964), cert. den. 379 U.S. 824, did not follow the hard line of dismissal of the *Link* case. There the District Court had reinstated a personal injury case 2 years after the dismissal for failure of plaintiff's attorney to prosecute, on motion of new counsel based on the ground that previous counsel was grossly negligent. The Court of Appeals noted that previous counsel had been beset with personal problems of serious illness of his wife and recent deaths of his parents. The plaintiff had also made an affidavit that he made "numerous inquiries of" his former counsel who assured plaintiff "from time to time that 'the case was proceeding and that settlement of if would be made soon' ". The court stated "There is no suggestion that there was any foundation for counsel's reassuring statements", and that:

> "On the part of Matthews himself there was no neglect. Cf. U. S. v. Karahalias, 205 F. 2d 331, on rehearing 334 (2d Cir. 1953). Clause (1) of Rule 60(b) is not and clause (6) is broad enough to permit relief when as in this case personal problems of counsel cause him grossly to neglect a dili-

> gent client's case and mislead the client. Clause (6) 'vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice'. *Klapprott* v. *U.S.*, 335 U.S. 601, 614-615, 69 S. Ct. 384, 93 L. Ed. 266 (1949) . . . In concluding that reinstatement was appropriate to accomplish justice in this case, the District Court did not abuse its discretion."

Judge Prettyman, Sr. C.J., joined Judge Edgerton, Sr. C.J., in that opinion, notwithstanding the fact that Judge Wilbur K. Miller, C.J., dissented in an opinion stating that the majority ruling was contrary to the rule of dismissal in the *Link* case, supra, and also contrary to Judge Prettyman's own dissent in *Barber* v. *Turberville,* 218 F.2d 34 (C.A. D.C.—1954). Judge Miller declared that the majority ruling in that *Barber* case was nullified by the *Link* case that had, in effect, adopted Judge Prettyman's dissent in that earlier case.

The *Steuart* case, supra, is still the rule in the District of Columbia. In *Bibeau* v. *Northeast Airlines, Inc.,* 429 F.2d 212 (C.A. D.C. July 10, 1970), that Court of Appeals *reversed a dismissal* of a plaintiff's wrongful death action for want of prosecution by his attorney, declaring that the District Court Judge abused his discretion and citing the *Steuart* case, supra. The Court of Appeals indicated in that very recent case that *lesser alternate sanctions* should be used, as the 3 dissenters in the *Link* case had, and stated that:

> ". . . the interests of justice require that the dereliction of counsel should not uniformly bar plaintiffs with valid claims from recovery through an inflexible application of the rule. The District Court's recent amendment to Rule 13, made effec-

tive soon after the District Court refused to reinstate the instant case, makes clear that Rule 13 is intended to deal with the errors of attorneys (through reference to the Committee on Admissions and Grievances) and not to punish their clients unnecessarily." (Parenthetical material supplied.)

(2) Second Circuit Court of Appeals

The Court of Appeals for the Second Circuit has also made clear that *lesser alternative sanctions* should be used, again as the dissenters in the *Link* case had. In *Schwarz* v. *U. S.*, 384 F.2d 833 (C.A.-2-1967), that Court of Appeals reluctantly affirmed a dismissal of a personal injury case for failure of counsel to prosecute, stating on page 835:

> "We would, however, suggest that the Court keep in mind the possibility, in future cases of inexcusable neglect by counsel, of imposing substantial costs and attorney's fees payable by offending counsel personally to the opposing party, as an alternative to the drastic remedy of dismissal."

That Second Circuit Court statement of position favoring the *less drastic sanctions* in such cases was quoted and given positive force by that Court of Appeals in the recent case of *Peterson* v. *Term Taxi, Inc.*, 429 F.2d 888 (C.A.-2-June 4, 1970), in which that Court *reversed a dismissal* for failure to prosecute. The Court stated:

> ". . . Nevertheless, as we said in Davis, supra, 'a court must not let its zeal for a tidy calendar overcome its duty to do justice'. 402 F.2d at 331.
>
> "We reiterate that 'the purpose behind close docket control is that of assuring that justice for all litigants be neither delayed nor impaired'.

Winston, supra, 415 Fed. at 621. The trial court's refusal here to reopen a case whose dismissal rested on plaintiff's poor judgment does not comport with those ends, and justice has been impaired by such inflexible attention to the docket. Whatever the merits of plaintiff's case may be, in our opinion justice requires that he be given a fair hearing on his claim."

(3) Fifth Circuit Court of Appeals

Similarly, the Fifth Circuit Court of Appeals supports the view that *lesser sanctions* than dismissal should be employed. In *Flaksa* v. *Little River Marine Construction Co., Inc.,* 389 F.2d 885 (C.A.-5-1968), cert. den. 392 U.S 928, the Court of Appeals stated:

"We are fully aware of the impelling need for cooperation from parties and attorneys to keep litigation on congested dockets moving; but except in extreme circumstances, the court should first resort to the wide range of *lesser sanctions* which it may impose upon the litigant or the derelict attorney, or both (Italics supplied)

* * * *

". . . The appellant was in no way connected with, or responsible for, his proctor's dilatory conduct. While we do not condone that conduct, we feel that the circumstances are not such that the appellant should lose his day in court."

The Fifth Circuit Court has most recently confirmed that rule favoring *lesser sanctions* than dismissal in *Brown* v. *Thompson,* 430 F.2d 1214 (C.A.-5-August 6, 1970), where it *reversed a dismissal* with prejudice. The Court quoted from its decision in *Flaksa, supra,* and then stated:

"In the decided cases it is recognized that the dismissal of a case with prejudice is a drastic

remedy to be used only in those situations where a *lesser sanction* would not better serve the interests of justice." (Italics supplied)

(4) Other Recent Authority

Moore's Federal Practice Rules Pamphlet of 1971 at page 827, under Rule 41 of the Federal Rules of Civil Procedure, cites *Meeker* v. *Rizley;* 324 F. 2d 269 (C.A. 10—1963) as authority for its statement that dismissal is too drastic for failure to attend a pretrial conference. In the District Court for the District of Rhode Island, the court in *King* v. *Mordowanec,* 46 F.R.D. 474 (D.C. R.I.—1969) announced in footnote 5:

> "Hereafter, beginning with April Term 1969, it will be the practice of this court to notify clients, where possible, of their lawyer's dilatoriness in cases such as this and to use the fine as a means of enforcing the court's rule rather than the use the dismissal as a means of visiting upon the innocent client the sins of his attorney. Indeed, the court is inclined to consider the use of an assessment of defendant's costs, in preparing and presenting these motions, against plaintiff's original attorney, if defendant chooses to pursue such a ruling."

B. The Decision Below Follows the Link Case Inflexibly, Conflicts With Other Courts of Appeals in Principle, Provides No Guidelines, and Ignores the Former Attorney's Acknowledged Infidelity.

Thus, the above Circuit Courts of Appeals appear clearly to have developed their own more just rule, finally rising above the confusion and widespread injustice caused by the *Link* case's unfortunate blanket blessing on all dismissals for attorneys' defaults at the unlimited discretion of District Court judges. The Third Circuit Court of Appeals, however, in the instant case continues the confusion and injustice caused by the

Link case. It has even added an element of special discrimination against lawyers as non-resident litigants. The District Court in the instant case plainly asked the Court of Appeals for some "guidelines" and a clarification of the "unusual nature of the circumstances" that it had said led to its reveral of the dismissal in the *Glo Co.* case, *supra,* where the case had been pending for 12 years, not 4 years as in the present case, there had been frequent periods of inactivity of record for more than one year, and repeated warnings and orders by the court to show cause why the case should not be dismissed. But the Court of Appeals made no attempt to provide any possible guidelines, and merely created greater mystery around the magic words "unusual nature of the circumstances" by stating that they "are not present here", with no explanation or reference to any specific unusual circumstances of either case.

Indeed, the Court of Appeals completely ignored the undenied facts of misrepresentations made to Spering by his attorney, as shown in his affidavits in the record below, Docket # 45, and reasserted in the transcript of the oral argument, Docket # 49, on the plaintiff's motion for reargument. The Court of Appeals made no mention of the fact that Spering's attorney did not deny any of these misrepresentations. Moreover, the Court completely ignored the confirmation by Spering's attorney of all those undisputed facts made in the following statements in his Appellant's Brief and in his Appellant's Reply Brief filed in the Court of Appeals:

In Appellant's Brief, page 9:

> "A brief review of the plaintiff's affidavit of September 20, 1969 or September 22, 1969 and his oral presentation to Judge Wright on October 16, 1969 (Tr. Hearing, J. Wright pp. 13-32, A-115

through A-134), make it abundantly clear that the plaintiff individually had no awareness that the pending action was in jeopardy for failure to prosecute. The very detailed statement of the plaintiff's individual efforts to urge prosecution and the information received by him from his counsel make the conclusion inescapable that any delay in prosecution is solely attributable to plaintiff's counsel rather than to plaintiff himself. There is nothing whatever in the record to indicate that the plaintiff had any knowledge of, or participation in, any failure to prosecute this action. Indeed, plaintiff personally believed, that defendant was responsible for delaying plaintiff's discovery proceedings until mid-December, 1968. See also affidavits, Docket # 45, A-79 through A-100."

Again, in Appellant's Reply Brief, page 8, plaintiff's former attorney acknowledged some of the most critical information he had given plaintiff over a period of years, as follows:

"From March 28, 1967 until December 20, 1968, a period of twenty-one (21) months, Spering personally believed, from information received from his attorney, that defendant was responsible for delaying that examination of defendant's records. He understood that defendant had not yet completed consolidating all such files and records from Houston and New York at one location and had not yet determined which papers did not relate to plaintiff that defendant might refuse to allow to be examined. See page 6 and preceding pages of plaintiff's affidavit dated September 20, 1969, Docket # 45 A-93, and plaintiff's statements to the Court at the Hearing on October 16, 1969, pages 13-32, Docket # 49, A-115 through A-134.

* * * *

"The truth of the matter is that plaintiff personally never even saw those answers filed by de-

> fendant to interrogatories and never knew of their contents until September 22, 1969, after Judge Steel's order of dismissal of the case. See paragraph 5 on page 2 of plaintiff's affidavit dated October 14, 1969, Docket # 45, A-80."

The quotation, in the Court's Opinion, from Spering's letter to his former attorney almost six months prior to the order of dismissal, by omitting certain words from the sentence, creates an erroneous sense not really there. The full sentence was "I fear that so much time has gone by without action on our part that we have probably already prejudiced *our negotiative position in the case, if not also* our position before the court". The words in italics were omitted by the Court. The omitted words, "if not", suggest that it was "slightly possible to have been prejudiced before the court" or "possibly in time to be prejudiced before the court though *not* yet". They certainly do not suggest that the writer was aware of any real, imminent, and serious prejudice before the court. Spering had only in mind the possibility that the District Court might fix a date by which discovery would have to be completed, which would not allow adequate time to complete the full discovery that he believed needed in the best interest of satisfactory prosecution of his case. The full test of that letter appears in the Appendix.

In the first paragraph of its Opinion, the Court of Appeals acknowledges that Spering's "claim might ultimately have had some *substantial merit.*" (Italics supplied). Consequently, in affirming the dismissal of his case in substantial part, the Court contravenes without discussion a number of its own decisions which have reversed such dismissals for attorneys' defaults

in matters *involving substantial claims.* See *Dyotherm Corporation* v. *Turbo Machine Company,* 392 F. 2d 146 (C.A.-3-1968); *Glo Company* v. *Murchison and Company,* 397 F. 2d 928 (C.A.-3-1968), cert. den., 89 S. Ct. 290, 393 U.S. 939 (1968); and *Viking Theatre Corp.* v. *Paramount Film Distributing Corp.,* 362 F. 2d 980 (C.A.-3-1966). *Thus,* it seems reasonable to surmise that the Court of Appeals may have been influenced in its decision in Spering's case by its own desire to receive *some guidelines* from the Supreme Court.

2. UNDER THE LAW OF AGENCY A PLAINTIFF CANNOT BE BOUND BY HIS ATTORNEY'S ACTION OR INACTION WHEN CONTRAVENING HIS AGENCY, AND THE RESULT OF HIS INACTION IS BEYOND HIS AUTHORITY.

A. A Breach of Agency by the Agent Suspends the Relationship

An attorney is bound to the highest duty of fidelity, honor, fair dealing and full disclosure to a client. *Udall* v. *Littell,* 366 F. 2d 668, 125 U.S. App. D.C. 89 (1966), cert. den. 87 S. Ct. 713, 385 U.S. 1007, 17 L. Ed. 2d 549, rehearing denied 87 S. Ct. 952, 386 U.S. 939, 17 L. Ed. 2d 812. As an attorney himself, Spering has been more aware of these high standards of fidelity to client required of attorneys than a layman would be expected to be. Spering therefore believed that all that his attorney told him was true, and that all pertinent information concerning the status of his case was being currently provided to him by his attorney. Consequently, the Court of Appeals' statement that the harsh rule of dismissals under the *Link* case should be "more strongly applicable" to a lawyer-litigant than to a layman is as discriminatory and unjustified as the rule is harsh and defeative of justice between the parties in the case. This is especially so when the rule itself is

based on a theory of the existence of an agency of the lawyer for his client.

Under the law of agency, if the agent steps aside from the business of his principal to promote purposes of his own, the relation of agency is for the time being and to that extent suspended. *Silverado S.S. Co.* v. *Prendergast,* 31 F.2d 225, (C.A.-9-1929). See article in *45 A.L.R. 2d 14* re bad faith or fraudulent conduct of attorney. A client would not be bound by the acts of his attorney if the client alleges and proves his attorney's misconduct amounting to a breach of legal duty faithfully to represent his client. *Williams* v. *Beto,* 354 F.2d 698 (C.A.-5-1965). The case of *Fretz* v. *Stover,* 89 U.S. 198, 206, 22 Wall. 198, 206, 22 L.Ed. 769, 771 (U.S. Va. 1875) has been cited for the proposition that clients are not bound by the wrongful acts of their attorneys. Also one who seduces an agent to betray his principal or an attorney his client, can hold none of the fruits of his bargain. *Barnett* v. *Kunkel,* 259 F. 394, 170 C.C.A. 370 (C.A.-10-1919).

B. An Attorney Cannot Accomplish by Default a Dismissal of His Client's Case, Which He Cannot Accomplish Directly Without Express Authority

An attorney employed to prosecute an action has no general or implied authority to compromise or dismiss the action with prejudice or to stipulate in such manner as to surrender substantial rights. *Whitebird* v. *Eagle-Picher Co.,* 258 F.Supp. 308 (D.C., Okla. 1966). An attorney of record may not compromise, settle, or consent to final disposition of his client's case without express authority. *Thomas* v. *Colo. Trust Deed Funds, Inc.,* 366 F.2d 136 (C.A.-10-1966), citing 7 C.J.S., Atty & Client, # 86 and # 105a. *Preveden* v. *Hahn,* 36

F.Supp. 952 (D.C. N.Y.-1941). *Gallegos* v. *Turner,* 256 F.Supp. 670 (D.C. Utah-1966). See also *Note in 56 A.L.R. 2d 1290,* annotating with approval *Virginia Concrete Company* v. *Board of Supervisors,* 197 Va. 821, 91 S.E. 2d 415, 56 A.L.R. 2d 1283 (1956), which cites on page 1292 cases in 14 different jurisdictions to the effect that special authorization is necessary for such purposes. Further, that A.L.R. Note states, among other things:

> "Where an action is dismissed or otherwise terminated at the instance of an attorney acting without proper authority, the client is ordinarily entitled to have the order or judgment set aside and the cause reinstated." (citing cases in 8 different jurisdictions), at page 1299.

In the dissenting opinion of Mr. Justice Black, concurred in by Chief Justice Warren, in the *Link* case, supra, it is stated at page 646,

> "There surely can be no doubt that if the plaintiff's lawyer had gone into court without authority and asked the court to dismiss the case so as to bar any future suit from being filed, this Court would repudiate such conduct and give the plaintiff a remedy for the wrong so perpetrated against him."

More recently, in *McKinney* v. *Boyle,* 404 F.2d, 632 (C.A.-9-December 18, 1968) cert. den. 89 S. Ct. 1481 (1969), a personal injury action was dismissed by a plaintiff's attorney in his absence allegedly by "fraud" on the part of the attorney and the plaintiff's former wife. Based on plaintiff's affidavit, he never agreed to any settlement nor gave any authority to his wife or anyone to settle for his injuries, and never received any proceeds of any settlement. The Court of Appeals, citing the *Klapprott* case, supra, and the *Steuart* case,

supra, among others, ruled that this brings plaintiff within ground (6) of Rule 60(b) F.R.C.P. as to which there is no fixed time limit for a motion to vacate the earlier dismissal of his case, and ruled that the dismissal should be vacated.

The infidelity of Spering's former attorney in this case seems totally inexplicable. In fact, the attorney himself had no explanation to give to the District Court when confronted with it at the hearing October 16, 1969. But then sometimes lawyers do some curious things. Indeed, it seems curious that TB&C's attorneys in the instant case, John R. Hupper, Esq., and his firm, Cravath, Swaine & Moore, of New York, and the firm of Richards, Layton & Finger, of Wilmington, Delaware, knowing of the gross and critical neglect of Spering's case by a senior trial lawyer in the Wilmington, Delaware law firm, Morris, James, Hitchens & Williams, whose representation of Spering resulted in dismissal of his case with prejudice, should recently have brought in the firm of Morris, James, Hitchens & Williams to represent Shell Oil Company a defendant in a derivative action by stockholders of Shell Oil Company against the Royal Dutch/Shell Group, its affiliates Asiatic Petroleum Corp. and Shell Petroleum, N.V., and Monroe E. Spaght (a former president of Shell Oil Company), all of whom were represented by John R. Hupper, Esq. and his firm, Cravath, Swaine & Moore, and against certain other individual defendants (officers of one or more of the defendant companies), represented by Richards, Layton & Finger. This alignment of counsel for defendants and the fact that 69% of the stock of Shell Oil Company is owned or controlled directly or indirectly by the Royal Dutch/Shell Group, appear in the reported case of *Halpern* v. *Bar-*

ran et al., 272 A. 2d 118 (Court of Chancery, Delaware —December 15, 1970). The selection of Morris, James, Hitchens & Williams, and not Richards, Layton & Finger, to represent Shell Oil Company in that case seems the more curious since the firm of Richards, Layton & Finger has represented Shell Oil Company at least once in the past, in *Petition of Shell Oil Company*, 203 A. 2d 845 (Superior Court of Delaware, in a rezoning case—September 29, 1964).

3. THIS CASE INVOLVES CRITICAL ELEMENTS IN MATTERS OF DISMISSALS WITHOUT A TRIAL FOR ATTORNEYS' DEFAULTS FOR WHICH GUIDELINES ARE NEEDED FROM THE SUPREME COURT.

The cases reviewed above suggest that some Courts of Appeals have been developing some guidelines to be followed in lieu of automatic, inflexible dismissals of substantial claims for attorneys' defaults in the unlimited discretion of District Court trial judges pursuant to the *Link* case, supra. Essentially all of the critical elements considered in those developing guidelines are present in the instant case.

One significant element appears to the petitioner to be of underlying importance where, as here, jurisdiction in the federal court is based upon diversity of citizenship. Plaintiffs in such cases are most often non-residents living considerably more than a hundred miles from the jurisdiction of the court. In such cases plaintiffs need greater protection of their rights against defaults of their attorneys under local court rules and practices. Not only are plaintiffs unfamiliar with such rules and practices and the dependability of the various local attorneys, but even their own non-resident attorneys are forced to depend on local attorneys for performance in accordance with local District Court Rules

and practices. This case emphasizes the vulnerability of such non-resident plaintiffs under local court rules and practices, since even a plaintiff who is a lawyer has been unwittingly victimized under such local rules in a case of great importance to him and his family. It involves full, fair compensation for more than 10 years of service for TB&C, a quarter of a normal professional lifetime of services, that called upon his unique knowledge and skills developed over a preceding period of nearly 12 years.

Some of the elements of the guidelines that have been developing in some Courts of Appeals, petitioner believes, may be summarized somewhat as follows:

1. Where gross or inexcusable neglect or misconduct of an attorney, or incorrect and misleading information from an attorney to his client, coupled with persistent concealment of the truth, have occurred, the agency of the attorney is breached, and/or is non-existent or suspended, during such periods, so that a plaintiff cannot justly be charged by a court with dismissal consequences because of his attorney's critical defaults. Rule 60 (b)(6) F.R.C.P. contemplates that a plaintiff shall be entitled to relief from any consequent dismissal of his case in any of such cases where the plaintiff himself is without knowledge of the critical nature or extent of his attorney's defaults and has not participated in them.

2. Dismissals with prejudice without a trial on the merits, where some relevant facts remain in dispute to be resolved by trial, are abhorrent as unjust denials of a party's property interest in his cause of action, and should not be entered, or should be vacated, where the plaintiff himself has not participated in the critical

defaults of his attorney and has not received notice of the critical nature of his attorney's defaults, and has not been afforded a reasonable opportunity to correct such defaults and proceed with the case.

3. An attorney for a plaintiff cannot, by neglect, misrepresentation, or fraud, achieve a dismissal with prejudice of his client's case without a trial on the merits for his failure to prosecute, a result which attorneys do not have any general or implied authority to achieve by formal action, by agreement or stipulation on the record, without express authority to do so from their clients.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Third Circuit Court of Appeals.

Respectfully submitted,

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Attorney for Petitioner
Acting for Himself

July 19, 1971

APPENDIX

APPENDIX

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434 F. 2d 677

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18,358

HOWARD S. SPERING, *Plaintiff-Appellant*,

v.

TEXAS BUTADIENE & CHEMICAL CORPORATION,
a Dissolved Delaware Corporation, *Defendant-Appellee*.

(D.C. Civil Action No. 3047)

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF DELAWARE

Argued May 18, 1970

Before ALDISERT, ADAMS, *Circuit Judges* and
HIGGINBOTHAM, *District Judge*

Opinion of the Court

(Filed October 21, 1970)

(as modified by Order November 13, 1970)

HIGGINBOTHAM, *District Judge*.

We are asked to decide whether the District Court abused its discretion in dismissing plaintiff-appellant's case with prejudice under a Local Rule which provides for dismissal of cases in which, without good reason, no action has been taken for a period of one year.[1] We conclude that the Dis-

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[1] Civil Rule 12 of the United States District Court for the District of Delaware provides:

> "Subject to the provisions of Rule 23(c), F.R.C.P., in each cause pending, wherein no action has been taken for a period of one year, the Court may, on its own motion or upon application of any party and after reasonable notice, enter an order

trict Court did not abuse its discretion. We do so fully mindful that appellant's claim might ultimately have had some substantial merit.

I. *History of the Case in Court.*

Plaintiff-Appellant Howard Spering's three-count complaint was filed on June 25, 1965. In twenty paragraphs appellant detailed a series of legal actions undertaken on behalf of defendant-appellee Texas Butadiene & Chemical Corporation (hereinafter "TB&C") from 1954 through 1964 and for which he was allegedly not fully compensated. Invoking breach of contract, unjust enrichment, and quantum meruit theories of recovery, appellant asked for judgment in the amount of $901,322.83, plus interest, costs, and counsel fees.

TB&C filed its amended answer on January 17, 1966. In addition to ten affirmative defenses, the amended answer avers that "defendant has paid plaintiff in full for all services rendered . . . with the exception of services rendered after February 25, 1964, with respect to which defendant has paid $6,000.00 on account, but as to which plaintiff has not yet submitted a final statement."

TB&C filed twenty-one interrogatories to plaintiff on December 14, 1965. Plaintiff objected to interrogatories 2, 4, and 6 through 21. On July 29, 1966 Chief Judge Wright overruled plaintiff's objections subject to a limitation, and plaintiff filed his answers on October 2, 1966.

The remainder of 1966 saw no further record action taken in the lawsuit. Nor was any record action taken in all of 1967. It was only on February 1, 1968—one year and four months less a day after plaintiff last acted in the

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dismissing such cause unless good reason for the inaction is given. An application for continuance shall not be deemed to be action precluding such dismissal. After any such application for dismissal has been filed, no application for a continuance or any proceeding taken under the discovery rules, F.R.C.P., shall be deemed to toll the application of this Rule."

lawsuit—that Spering filed four interrogatories to TB&C. No official notice was made of this first delay in excess of one year. TB&C completed its answers to plaintiff's interrogatories on May 21, 1968.

On August 2, 1968 Civil Action No. 3047, *Howard Spering* v. *Texas Butadiene & Chemical Corporation* was more than three years old. Accordingly, pursuant to Local Rule 3 of the District Court for the District of Delaware, plaintiff was asked on that day to file with the Clerk of the Court "a statement in sufficient detail explaining why the case has not proceeded more expeditiously." [2]

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[2] The full text of Local Rule 3 of the United States District Court for the District of Delaware is as follows:

"Rule 3. Calls of Calendar; Dismissal for Failure to Prosecute; Three-year Cases.

"There shall be a calendar call at the beginning of each term. The calendar shall consist of all cases in which, as of July 1 of the year in which the calendar is called, no action has been taken by the parties or their counsel for a period of one year (one-year cases), and of all cases which, as of July 1, have been pending for a period of three years (three-year cases).

"On or before the 20th day of August, the Clerk shall send a copy of the calendar and notice of this Rule to all counsel whose names appear in said calendar, or if no counsel appear, to the parties at their last known address. Such mailing shall be deemed good and sufficient notice of the provisions below.

"Subject to the provisions of Rule 23, F.R.C.P., counsel or the parties, in the one-year cases, shall appear at the call of the calendar and show cause, if any they have, why the case should not be dismissed. If counsel or the parties fail to appear or show cause why the case should not be dismissed, an order of dismissal shall be entered by the Court.

"Counsel or the parties in the three-year cases shall, before the first Tuesday in September, file with the Clerk in duplicate a statement in sufficient detail explaining why the case has not proceeded more expeditiously.

"Thereafter the Court may take such action if any, as appears warranted."

In a response dated September 3, 1968 counsel could "only suggest that the plaintiff himself is an attorney actively engaged in the practice of law in Washington, D.C., the period of time during which the claim asserted by the plaintiff arose extends over a period of years, and a great number of documents, memoranda and correspondence had to be reviewed from time to time as the case proceeded." By way of conclusion, plaintiff's attorney stated: "Plaintiff intends to proceed at this point more expeditiously in preparation for the trial of this case." Defendant's letter to the Clerk of the Court stated defendant's position that "it is incumbent upon plaintiff to move the case along promptly or dismiss it." The District Court took no action at that time.

Another eleven months passed without a single record action in the case. More than a year and a half had passed since plaintiff had filed four interrogatories on February 1, 1968, and with the exception of these four questions answered in May of that year, no record action had been taken by plaintiff to advance his case in thirty-four months. As in 1968 also in 1969, the Clerk of the Court, pursuant to Local Rule 3,[3] called upon plaintiff to explain why his case had not proceeded more expeditiously. Pending for three years, plaintiff's case was now also one in which no action had been taken for a period of one year (for the second time). Plaintiff had therefore to show cause why the case should not be dismissed.

On August 6, 1969 defendant moved to dismiss plaintiff's case, basing its motion in part on Local Rule 12.[4] In a letter to the Clerk of the Court, with copies to Chief Judge Wright, Judge Steel, and counsel for Spering, defendant stated its intention to "bring its motion to dismiss to the attention of the Court at the Call of the Calendar" scheduled for September 16, 1969.

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[3] See text of Rule above, p. 3.

[4] See text of Rule above, p. 1.

Plaintiff Howard Spering, himself a lawyer, was not unaware of the dangerous drift that had set in for some time in the prosecution of his case. In a letter to his attorney dated March 26, 1969 Spering noted that "months have gone by without our moving forward in our case against Texas Butadiene & Chemical Corporation." "I fear," he continued, "that so much time has gone by without action on our part that we have probably already prejudiced our negotiative position in the case, if not also our position before the court." [Letter attached to affidavit filed October 15, 1969, Docket Entry No. 45.]

At the Call of the Calendar on September 16, 1969 the following exchange took place between Judge Steel and the attorney for plaintiff Spering:

> "The Court: This case was begun in June of 1965. That is four years ago. The last action was taken on May 21, 1968."
>
> "(Plaintiff's attorney): Yes."
>
> "The Court: Now, I read the letter of explanation for this delay. One reason given was extensive research relating to legal defenses. Now these defenses were raised in an amended answer filed in January of 1966, more than three years ago. Now the defenses can't have been so complex that for three years they required extensive research."
>
> "(Plaintiff's attorney): No, sir, but the answers to interrogatories that Defendant made in May of 1968 set forth information relating to those defenses."
>
> "The Court: Well, why weren't the interrogatories filed before that? Here was an answer which told you what you were going to have to meet in January of 1966 and you waited until some time in 1968 to find out the facts you needed. I think it is inexcusable. I think there is no justifiable cause shown for the delay, and under the one-year rule I shall dismiss the action and I shall grant the motion to dismiss." [Notes of Testimony, Call of Calendar, Docket Entry No. 50, p. 3.]

On September 16, 1969, Judge Steel ordered Spering's action dismissed with prejudice. Plaintiff moved for reargument, and plaintiff and counsel for the defendant filed affidavits with the Court. On October 16, 1969 Chief Judge Wright heard reargument, which he considered as argument on a motion to vacate Judge Steel's order of dismissal. The Chief Judge stated that he considered it his duty "to examine the record and consider what Judge Steel did, and if I find anything in there that I would think was an abuse of discretion by Judge Steel . . . do something about it. Absent that, the ruling will stand." Notes of Testimony, Reargument October 16, 1969 p. 2. At the conclusion of the reargument, having heard counsel for both plaintiff and defendant as well as the plaintiff himself and having examined the total record, Chief Judge Wright denied plaintiff's motion. The dismissal of Civil Action No. 3047 became final and this appeal followed.

II. *There has been no Abuse of Discretion; the Order of Dismissal will be Affirmed.*

Dismissal of a lawsuit for inaction is clearly within the sound discretion of the federal district court. *Link* v. *Wabash Railroad Company,* 370 U.S. 626, 82 S. Ct. 1386 (1962). Absent a clear abuse of discretion by the district court, we will not reverse the court's order of dismissal. *Kenny* v. *California Tanker Company,* 381 F.2d 775 (CA3, 1967). In determining that there has been no such abuse of discretion in the instant case, we have carefully considered all of the circumstances and the entire record of the matter.

As our extensive recital of the history of the case has indicated plaintiff is himself a lawyer and as such not unaware of the importance of exercising rights timely. Just as the failure to comply with the statute of limitations might extinguish an otherwise valid right so are there perils from extended inaction in the conduct of a lawsuit.

Indeed in plaintiff's letter to his attorney almost six months prior to the order of dismissal he expressed the "fear that so much time has gone by without action on our part that we have probably already prejudiced . . . our position before the court."

Appellant argues that "this is not . . . (his attorney's) lawsuit, it is Mr. Spering's lawsuit;" and that "any delay in the prosecution of the claim has not been Mr. Spering's responsibility, it has been (plaintiff's lawyer's) responsibility." The effect of the dismissal, appellant concludes "is to invoke a severe and harsh penalty upon a plaintiff who himself has not been, if you will, guilty of any conduct that caused delay in the prosecution." [Notes of Testimony, Reargument pp. 8 and 9, Docket Entry No. 49.] To this contention the Supreme Court of the United States replied:

> "There is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.'" (Citation omitted) *Link* v. *Wabash Railroad Company,* 370 U.S. 626, at 633-634, 82 S. Ct. 1386, at 1390.

Where plaintiff is himself an attorney the Supreme Court's words are the more strongly applicable.

The validity of Local Rule 12 of the United States District Court for the District of Delaware is unchallenged here. The Rule provides that in a case where no action has been

taken for a period of one year the Court may, after reasonable notice, dismiss such case unless good reason for the inaction is given. Appellant has been given full and fair opportunity to explain his inaction. At reargument before Chief Judge Wright appellant's attorney stated:

> "it doesn't excuse the prosecution of the claim that some admitted amount is due and owing nor the neglect, if you will, in pursuing the claim."

* * *

In response to the Court's question, "did you make any effort to ever get (the documents involved in this dispute)," appellant's attorney could only say: "No, sir." (p. 9)

* * *

The Chief Judge stated that he could not understand how appellant's lawyer "could let a case ostensibly involving this much money simply lay in your office without any activity, especially after you had been warned a year ago that some action had to be taken, and when you promised the court that some action would be taken." Appellant's attorney could only reply: "Well I regret to say to Your Honor that I cannot give you a satisfactory explanation." (pp. 9, 10)

Two judges of the District Court considered appellant's arguments and did not find in them the "good reason for the inaction" required by Rule 12. We have passed over the same ground and more and are also satisfied that there has been no abuse of discretion. Reversal of the District Court's order of dismissal is unwarranted.

One last matter merits discussion. Appellant has relied heavily on *Glo Company* v. *Murchison and Company,* 397 F.2d 928 (CA3, 1968), cert. den. 89 S. Ct. 290, 393 U.S. 939 (1968). In its first opinion reversing an order of dismissal this court relied heavily on the fact that "there appears to be no dispute that an amount of money is owed to plaintiff under the contracts in suit." (at p. 929). In a

later opinion on rehearing this court said: "after consideration of the complex factual circumstances of the case, we conclude with the greatest reluctance that in view of the unusual nature of the circumstances of this case the interest of justice will best be served by affording plaintiff an opportunity to prove its case at trial."

Taking the opinions in reverse order, we conclude that the "unusual nature of the circumstances" in *Glo Company* are not present here. There is in this suit however, "no dispute that an amount of money is owed to plaintiff." As noted above TB&C admitted in its amended answer that it had not paid plaintiff for services rendered after February 25, 1964. TB&C has often renewed its promise to pay plaintiff upon receipt of a bill (see appellee's brief, p. 26) and has paid $6,000.00 on account. We will sustain the Order of Dismissal entered by the District Court below. The case insofar as it relates to any claims prior to February 25, 1964 is thus stricken from the docket.

At the same time we will allow appellant to pursue his claim for services admittedly rendered to appellee after February 25, 1964. The District Court is directed to limit its inquiry and any award which it might make to services actually performed by appellant for appellee after February 25, 1964.

The case is remanded to the District Court with instructions to modify its Order of Dismissal and to proceed as to the admitted claim in accordance with this Opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18,358

HOWARD S. SPERING, *Plaintiff-Appellant,*

v.

TEXAS BUTADIENE & CHEMICAL CORPORATION, a Dissolved Delaware Corporation, *Defendant-Appellee.*

Sur Petition for Rehearing

Present: HASTIE, *Chief Judge,* and SEITZ, VAN DUSEN, ALDISERT, ADAMS, GIBBONS and ROSENN, *Circuit Judges,* and HIGGINBOTHAM, *District Judge.*

The petition for rehearing filed by HOWARD S. SPERING, Plaintiff-Appellant, in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

WILLIAM H. HASTIE
Chief Judge

Dated: April 19, 1971

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 3047

HOWARD S. SPERING, *Plaintiff*,

v.

TEXAS BUTADIENE & CHEMICAL CORPORATION, a dissolved Delaware corporation, *Defendant*.

Order

WHEREAS this action was commenced on June 25, 1965 and defendant amended its answer on January 17, 1966;

WHEREAS no action has been taken for a period of more than one year; namely, no action has been taken since the filing by defendant of its answers to plaintiff's interrogatories on May 21, 1968;

WHEREAS defendant has moved to dismiss this action under Rule 12 of the Rules of this District on the ground that no action has been taken for a period of one year and on the ground that plaintiff has failed to prosecute this action;

WHEREAS said motion was duly presented to the Court and counsel for the parties were heard in support thereof and in opposition thereto; and

WHEREAS plaintiff has failed to show good reason for the inaction in accordance with Rule 12 of the Rules of this District;

IT IS ORDERED this 16th day of September 1969 that the motion of the defendant is granted and this action is dismissed with prejudice, costs to be paid by plaintiff.

/s/ EDWIN D. STEEL, JR.
Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

[Caption Omitted]

Order

THIS 16th day of October 1969, the Court having dismissed the above action with prejudice by order dated September 16, 1969 and filed September 17, 1969, and plaintiff having filed a motion on September 22, 1969, entitled "Plaintiff's Motion for Reargument" and defendant having filed its answer pursuant to Rule 16 of this District, and the Court having further considered said motion upon a hearing in open court in which counsel for the plaintiff and counsel for the defendant as well as the plaintiff himself were fully heard, and the Court having considered the entire record in this matter,

IT IS ORDERED that "Plaintiff's Motion for Reargument" is hereby denied.

/s/ CALEB M. WRIGHT
Chief Judge

LAW OFFICES
HOWARD S. SPERING

March 26, 1969

Arthur J. Sullivan, Esquire
Morris, James, Hitchens & Williams
701 Bank of Delaware Building
Wilmington, Delaware 19801

Dear Art,

So many of my telephone calls to you have not been completed, and months have gone by without our moving forward in our case against Texas Butadiene & Chemical Corporation. I fear that so much time has gone by without action on our part that we have probably already preju-

diced our negotiative position in the case, if not also our position before the court.

As you know, I have been holding myself ready for long periods at a time in order to be able to meet your convenience and the convenience of the attorneys for the defendant in New York. If my recollection is correct, it has now been more than two years since we made demand upon the defendant to permit us to examine the defendant's books and records, and it still has not been done.

I have not been responsible for any of this delay and I have pushed continually to go forward. All of this has been quite costly to me because I have had to avoid making some long-term commitments of my time to other matters.

I am sure you will agree that it is absolutely essential that we proceed with this case promptly. If you continue to find yourself so tied up with other matters that you cannot give this case the prompt attention that it must have, I think you must be frank with me and volunteer to withdraw from the case. If this is going to be your situation, you must put me in a position that I shall at least be able to seek counsel who can give the matter prompt attention.

Please let me hear from you.

Sincerely,

/s/ HOWARD
Howard S. Spering